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STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
HAWAII STATE CAPITOL  
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HONOLULU, HAWAII 96813

August 21, 1973

Ms. Casendra Dunn  
Regional Legal Counsel  
United States Environmental  
Protection Agency,  
Region IX  
100 California Street  
San Francisco, California 94111

Dear Casendra:

I am writing in response to your memorandum dated July 24, 1973 to R. O'Connell, relating to Chapter 45, Public Health Regulations, Department of Health, State of Hawaii. Before I continue however, you should be informed that Chapter 45 is now proposed amended Chapter 37; henceforth, I will be referring to Chapter 37, instead of Chapter 45. I will not address myself to any comments in your memorandum which confirms the existence of legal authority for I would rather speak to those comments which denies or questions the existence of authority to meet requirements of Public Law 92-500 or EPA regulation.

Your comment on Entry No. 3 states in pertinent part that specific authority is questionable with regard to the requirements of Section 403, FWPCA. What does this mean? Do you doubt that the Department can control ocean discharge under its authority derived from Chapter 342, Hawaii Revised Statutes? Since I do not believe this is the case, I must interpret that comment as meaning that you have not found any specific mention in Chapter 37 of the guidelines promulgated by the Director relating to ocean discharges. I am of the opinion that this is of little significance at this juncture in time since under Section 402(d), Public Law 92-500, no permit may issue if the administrator objects to the issuance of such permit.

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With respect to your comments on Entry No. 10 that there is no authority in Section 22(b) permitting inspection of premises other than those of a permittee, Section 342-10, Hawaii Revised Statutes, already bestows broad powers of entry and inspection of any actual or suspected source of water pollution. That statutory provision, of course, is controlling. Section 22(b) more specifically relates to conditions in permits and is in no way inconsistent with or contradictory to the broad powers delegated by Section 342-10. I do not understand how the nature of Section 22(b) is questionable. I see no need to reiterate in Chapter 37 what has already been made exceptionally clear in Section 342-10.

With regard to your comments on Entry No. 27, which states that authority is questionable because it is unclear whether Chapter 37 is issued pursuant to Part I or Part III of Act 100, I do not share this concern with you for I feel that it is very clear that Chapter 37 relating to water pollution control is adopted pursuant to both Part I, Definitions and General Provisions and Part III, Water Pollution. The general prohibition in Section 4 merely reiterates Section 342-33. The authority to control and abate water pollution, which Chapter 37 is an exercise thereof, is directly delegated by Section 342-32, Part III.

With regard to your comments on Entry No. 27 that specific authority to implement Section 124.73(g) is questionable, I concur. The Director of Health has absolutely no authority to collect criminal fines, nor do I believe he could or should have such authority. The Acts described in Section 124.73(g) are criminal acts of fraud and deceit and would be in violation of our Penal Code provisions. Such offenders could be prosecuted by a county prosecutor in a court of law.

I disagree that authority is vague (Entry No. 31) with regard to the requirements of Section 402(h), FWPCA relating to proceeding in a court of law to prohibit the introduction of a pollutant into a treatment works if it is evident that any provisions of a permit would be violated. Sections 342-32 and 342-33, Hawaii Revised Statutes, are broad enough to permit the Director of Health to control indirect sources of water

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pollution. (In way of analogy, see my letter to you dated August 13, 1973 regarding indirect sources of air pollution.) Any source introducing a pollutant into a treatment facility so as to violate a condition of a permit would be "engaging in activity which causes State waters to become polluted." Therefore, under Section 342-12, Hawaii Revised Statutes, injunctive relief may be sought. In any case, no permittee desiring to retain his permit would allow the introduction of a pollutant into his treatment works despite the express disapprobation of the Department of Health.

7 Finally, with regard to your comment on Entry No. 33 that there is no authority in Chapter 37 for the enforcement of the requirements of Section 405(c), FWPCA, I do not concur. Although no specific reference to permits for the disposal of sewage sludge into navigable waters is made in Chapter 37, statutory authority does exist should the Department of Health desire to gain EPA authority to issue permits under Section 405(c). However, the Department has no desire to have such authority since sewage sludge in Hawaii will be disposed of by means of sanitary land fills.

I believe I have responded to most or all of the points raised in your memorandum which points concluded that authority was either lacking or questionable. In any case, since the Department has already held its public hearings, it would be impossible to meet every one of your objections without conducting additional hearings. I hope at least, that you will agree with me that Chapter 37, which draws very heavily upon EPA guidelines, will, in spite of the points raised in your memorandum, not be a roadblock to obtaining EPA approval for NPDES permit authority.

What gives me great concern is your not having commented on Chapter 37-A and in particular, those provisions therein relating to zones of mixing. What is your opinion of the legality of zones of mixing as described in Chapter 37-A? As you will note, a zone of mixing is a variance as set forth in Chapter 342, Hawaii Revised Statutes. Is the concept of zones of mixing acceptable to EPA and consistent with P.L. 92-500?

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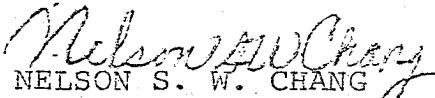
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Chapter 37-A has already gone through the hearings process and is ready for final adoption by the Department. Since Chapter 342 creates such a thing as a variance, I do not believe that the Department can by regulation set it aside completely.

Thank you very much. We await your reply.

Very truly yours,

  
NELSON S. W. CHANG  
Deputy Attorney General

cc: Dr. Henri Minette